LIPUTAN CANGGIH SDN BHD & ORS v. CHONG CHUAN LONG & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
RAVINTHRAN PARAMAGURU JCA
GHAZALI CHA JCA
[CIVIL APPEAL NOS: B-02(IM)-1180-09-2020
& B-02(IM)-1284-09-2020]
13 JUNE 2022

Abstract – *An application for leave to commit a liquidator for abuse of process in the conduct of a litigation involving a wound-up company is not specifically provided for in ss. 486 or 541 of the Companies Act 2016. Those provisions only enable a creditor or contributory to act against a liquidator. Therefore, inherent jurisdiction can be invoked to obtain leave of the winding up court. If it is proven that a liquidator is being sued in his capacity as the party having overall conduct and control of a litigation, the applicants indeed have the locus standi to apply for leave. Allegations that are not properly addressed by the High Court Judge points to a prima facie case or probability of success for the purpose of a leave application, especially when it is difficult to conclude on the undisputed facts that an application is frivolous or vexatious.*

CIVIL PROCEDURE: *Contempt of court – Committal proceedings – Ex parte application filed at winding-up court – Leave to commit liquidator to prison for contempt of court – Whether intended contempt proceedings against liquidator could be brought within ambit of ss. 486(2) or 541 of Companies Act 2016 – Whether liquidator sued in capacity as party having overall conduct and control of litigation – Whether inherent jurisdiction could be invoked to seek leave – Whether applicants had locus standi to bring action – Probability of success against liquidator – Whether there was breach of principle of natural justice – Whether application frivolous or vexatious*

COMPANY LAW: *Liquidators – Committal proceedings – Leave to commit liquidator to prison for contempt of court – Ex parte application filed at winding-up court – Whether intended contempt proceedings against liquidator could be brought within ambit of ss. 486(2) or 541 of Companies Act 2016 – Whether liquidator sued in capacity as party having overall conduct and control of litigation – Whether inherent jurisdiction could be invoked to seek leave – Whether applicants had locus standi to bring action – Probability of success against liquidator – Whether there was breach of principle of natural justice – Whether application frivolous or vexatious*

Liputan Canggih Sdn Bhd and six other parties were the plaintiffs in a civil suit ('Suit 534') filed in the High Court against six defendants for civil fraud. One of the six defendants was K&A Management. One Chong Chuan Long ('CCL') was appointed as the interim liquidator. K&A Management was subsequently wound-up due to inability to pay its debts and CCL was appointed as liquidator. The applicants filed a notice of application (*ex parte*) in Suit 534 to commit all the six defendants to prison for contempt of court, and the liquidator of K&A Management was included as an alleged contemnor in this notice of application. The High Court Judge ('HCJ'), who heard the application in Suit 534, granted leave against all the defendants except the liquidator. The HCJ was of the view that since the liquidator was an officer of the court, prior leave must be obtained from the winding-up court. The applicants then filed an *ex parte* application at the winding-up court under s. 486(2) of the Companies Act 2016 ('CA') and/or the High Court's inherent jurisdiction for leave to commence committal proceedings against the liquidator. The HCJ at the winding-up court granted the *ex parte* motion for leave. The liquidator applied to set aside the *ex parte* leave order. The HCJ set aside the *ex parte* order he had made earlier in which His Lordship granted leave to the applicants to commence contempt proceedings against the liquidator in Suit 534. In arriving at his decision, the HCJ made three findings (i) that the applicants had *locus standi* to bring an action against the liquidator of K&A Management although they were not creditors or contributories of the latter company; (ii) there was no probability of success for the action against the liquidator; and (iii) the applicants had breached the principle of natural justice by seeking the *ex parte* leave order that His Lordship had granted earlier. Two appeals arose herein, Appeal 1284 and Appeal 1180, originating from the same decision of the winding-up court. In Appeal 1284, which was filed by K&A Management and the liquidator, the main question arose as to whether the applicants had *locus standi* to file the *ex parte* motion for leave. Three subsidiary issues were argued (i) whether the applicants could rely on s. 486(2) of the CA; (ii) whether the applicants could invoke 'inherent jurisdiction' in the alternative; and (iii) whether inherent jurisdiction could be invoked to seek leave. In Appeal 1180, the main issues were whether application for leave *via* an *ex parte* application resulted in a breach of natural justice and whether the intended committal application in Suit 534 had prospect of success.

Held (allowing Appeal 1180; dismissing Appeal 1284)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) Section 486 refers to the powers of the liquidator in respect of the management of the wound-up company and administration of the liquidation. Subsection (2) clearly states that only the creditor or the contributory may question the exercise of the said powers by the liquidator by applying to the court. The application for leave of the applicants could not come under this provision. (para 13)

(2) 'Inherent jurisdiction' was specifically stated in the body of the *ex parte* motion. The applicants included an omnibus prayer seeking 'any further and/or other orders or relief.' Therefore, relief could be granted under the omnibus prayer as it was not there for ornamental purposes. 'Inherent jurisdiction' was properly pleaded and invoked in the motion. (para 14)

(3) Prior leave from the winding-up court was required before the applicants could proceed with the committal proceedings against the liquidator. The liquidator as an officer of the court is subject to the court's inherent jurisdiction especially on a matter that was not covered by the provisions of the CA. The intended contempt proceedings against the liquidator could not be brought within the ambit of either ss. 486(2) or 541 of the CA. However, that did not mean that the liquidator by default achieved some sort of immunity insofar as his conduct as an officer of the court was concerned especially *vis-a-vis* intended contempt of court proceedings. Leave had been sought against the liquidator to commit him for contempt of court for not disclosing to the court in Suit 534 that the company had been wound-up and for other reasons that allegedly amounted to abuse of the process of the court. Thus, the liquidator was being sued in his capacity as the party having overall conduct and control of the litigation. The applicants therefore had *locus standi* to apply for leave. Appeal 1284 was therefore dismissed. (paras 19, 24, 27 & 31)

(4) Although the HCJ granted *ex parte* leave initially, one of his reasons for setting aside his decision was that the failure to serve the relevant cause papers on the liquidator occasioned a breach of natural justice and prejudice. However, as the leave order was obtained *ex parte*, the liquidator had a right to move the court to set it aside. He exercised that right. He was allowed to file affidavits to support the application and was given a full hearing. Thus, any defect by the non-service of the application had been cured by the right to apply to set it aside. In the premises, there was no breach of natural justice. (paras 32 & 37)

(5) The HCJ did not consider all the allegations that constituted the charges in the intended committal proceedings, including the fact that the judge in Suit 534 had fixed dates for trial but was not informed of all the developments from the appointment of the interim liquidator to the eventual winding-up of the company. There was opportunity to do so as the judge was still doing active case management at the material time. Furthermore, the point that the liquidator would have full control and conduct of the litigation of the wound-up company was not addressed either. The allegations that were not addressed by the HCJ pointed to a *prima facie* case or probability of success for the purpose of the leave application. The application was not frivolous or vexatious. After all,

A the leave sought was only for the purpose of the first stage of contempt proceedings under O. 52 of the Rules of Court 2012 which provided another level of filter in which the applicants must demonstrate a *prima facie* case before the matter could proceed any further. Therefore, Appeal 1180 was allowed. (para 42)

B **Case(s) referred to:**

Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow [1995] 4 CLJ 11 CA ***(refd)***

Dayu Tegas Sdn Bhd lwn. Segamat Oil Mill & Plantation Sdn Bhd [2015] 1 LNS 1418 HC ***(refd)***

Deloitte & Touche AG v. Johnson [1999] PC 486 ***(refd)***

C *Destination Marine Services Sdn Bhd v. ABS Pacific & Anor [1998] 3 CLJ Supp 355 HC* ***(refd)***

Lloyd-Owen v. Bull (1936) 4 DLR 433 ***(refd)***

Mansion Properties Sdn Bhd v. Sham Chin Yen & Ors [2021] 1 CLJ 609 FC ***(refd)***

Phuah Choon Hwang & Ors v. Hassan & Kong Yeam [1986] 1 CLJ 513; [1986] CLJ (Rep) 579 HC ***(refd)***

Sibu Slipway Sdn Bhd v. Yii Chee Ming & Ors And Other Appeals [2017] 6 CLJ 507

D *CA* ***(refd)***

Storer & Co Ltd v. Johnson and Weatherall (1890) 15 App Cas 203 ***(refd)***

Tan Tek Sin & Anor v. Tetuan Nora Hayati & Associates [2015] 1 CLJ 89 CA ***(refd)***

Tee Siew Kai v. Machang Indah Development Sdn Bhd (In Liquidation) [2020] 4 CLJ 841 FC ***(refd)***

Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors And Another Appeal [2010] 2 CLJ

E *858 CA* ***(refd)***

Zulkiflee SM Anwar Ulhaque & Anor v. Arikrishna Apparau & Ors [2013] 1 LNS 1264 CA ***(refd)***

Legislation referred to:

Companies (Winding-up) Rules 1972, r. 7

F Companies Act 1965, ss. 226(3), 305

Companies Act 2016, ss. 366, 368, 471, 486(2), 516, 541

Rules of Court 2012, O. 52

(Civil Appeal No: B-02(IM)-1180-09-2020)

For the appellants - Sudharsanan Thillainathan, Tania Kat-Lin Edward & Adrienne Sena; M/s Steven Thiru & Sudhar Partnership

G *For the respondent - K Kirubakaran, S Ravenesan & Siti Nur Amirah Aqilah Adzman; M/s S Ravenesan*

(Civil Appeal No: B-02(IM)-1284-09-2020)

For the appellants - K Kirubakaran, S Ravenesan & Siti Nur Amirah Aqilah Adzman; M/s S Ravenesan

H *For the respondents - Sudharsanan Thillainathan, Tania Kat-Lin Edward & Adrienne Sena; M/s Steven Thiru & Sudhar Partnership*

[Editor's note: Appeal from High Court, Shah Alam; Companies (Winding-up) No: BA-28PW-172-07-2019; Companies (Winding-up) No. BA-28NCC-506-09-2018] (overruled in part).]

I

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] There are two appeals before us. Both originate from the same decision of the High Court sitting in its winding-up jurisdiction (the winding-up court). In Appeal B-02(IM)-1180-09-2020 (appeal 1180), Liputan Canggih Sdn Bhd and six other parties are the appellants. They had applied to the winding-up court for leave to commence contempt proceedings against the liquidator of K & A Management Sdn Bhd. The liquidator of K & A Management is the respondent.

[2] In Appeal B-02(IM)-1284-09-2020 (appeal 1284), K & A Management Sdn Bhd (K & A) and the liquidator are the appellants. They have appealed against the part of the decision of the winding-up court dated 26 August 2020 that held that Liputan Canggih Sdn Bhd and the other parties have *locus standi* to make the application in question.

Background Facts

[3] Liputan Canggih Sdn Bhd and six other parties are the plaintiffs in Civil Suit BA-22NCvC-534-10-2018 (suit 534). It was filed in the High Court sitting in Shah Alam on 25 October 2018 against six defendants for civil fraud. One of the six defendants is K & A Management. On 7 December 2018, Mr Chong Chuan Long was appointed as the interim liquidator. On 18 January 2019, K & A Management was wound-up due to inability to pay its debts by Wondrous Orchard Sdn Bhd. Mr Chong Chuan Long was appointed as liquidator on 18 January 2019. On 10 May 2019, the winding-up court granted leave to the applicants to proceed against K & A Management.

[4] On 24 May 2019, the applicants filed a notice of application (*ex parte*) in suit 534 to commit all the six defendants to prison for contempt of court. The liquidator of K & A Management was included as an alleged contemnor in this notice of application. The High Court Judge who heard the application in suit 534 granted leave against all the defendants except the liquidator. His Lordship was of the view that since the liquidator is an officer of the court, prior leave must be obtained from the winding-up court. The applicants then withdrew their *ex parte* application under O. 52 against the liquidator with liberty to file afresh after leave is obtained from the winding-up court.

[5] On 4 July 2019, the applicants filed an *ex parte* application at the winding-up court under s. 486(2) of the Companies Act 2016 and/or the High Court's inherent jurisdiction for leave to commence committal proceedings against the liquidator. The orders sought were:

(i) to make the applicants intended committal application *ie,* an application in the SAHC suit for leave to commit the alleged contemnor to prison and/or fine for contempt of court; and

(ii) if leave is given by the Honourable High Court in the SAHC suit, to commence an application in the SAHC suit to commit the alleged contemnor to prison and/or fine for contempt of court.

[6] The applicants made the said application because the judge in suit 534 had refused the application under O. 52 of the Rules of Court 2012 for leave to commit the liquidator to prison without the leave of the winding-up court. On 12 July 2019, the learned High Court Judge at the winding-up court granted the *ex parte* motion for leave. On 6 September 2019, the liquidator applied to set aside the *ex parte* leave order.

High Court Decision

[7] The learned High Court Judge set aside the *ex parte* order he had made earlier in which His Lordship granted leave to the applicants to commence contempt proceedings against the liquidator in suit 534. In arriving at this decision, His Lordship made three findings that has given rise to the main issues in these appeals. They are as follows.

[8] Firstly, the learned High Court Judge held that the applicants have *locus standi* to bring an action against the liquidator of K & A Management although they are not creditors or contributories of the latter company. Secondly, the learned High Court Judge held that there is no probability of success for the action against the liquidator. Thirdly, the learned High Court Judge held that the applicants had breached the principle of natural justice by seeking the *ex parte* leave order that His Lordship had granted on 12 July 2019.

Issues

[9] In appeal 1284, which was filed by K & A Management and the liquidator, the main question that arises is whether the applicants have *locus standi* to file the *ex parte* motion for leave. In appeal 1180, the main issues are whether application for leave *via* an *ex parte* application resulted in breach of natural justice and whether the intended committal application in the suit 534 has prospect of success.

Locus Standi

[10] In respect of the *locus standi* point, three subsidiary issues were argued. They are:

(i) whether applicants can rely on s. 486(2) of the Companies Act 2016;

(ii) whether the applicants can invoke "inherent jurisdiction" in the alternative;

(iii) whether inherent jurisdiction can be invoked to seek leave.

Section 486(2)

[11] The applicants moved the court for leave under s. 486(2) of the Companies Act 2016 and/or the inherent jurisdiction of the court. The learned High Court Judge held that s. 486(2) of the Companies Act 2016 is not applicable as the applicants are neither creditors not contributories of K & A Management. But His Lordship held that the applicants have *locus standi* under the inherent jurisdiction of the court. The relevant passage of the judgment that is the subject of appeal 1284 by K & A Management and its liquidator is as follows:

> Now, the first question is, does the Applicants here as a third party have the *locus standi* to bring an action against the Liquidator pursuant to Section 486(2) of the Companies Act 1965 (previously Section 236(3) of the same Act). Applying the above provision of the Act, I would answer the issue in the negative. It is not disputed that the Applicants here are not the creditors or contributories of the K & A Management Sdn Bhd (in liquidation). Hence, they are not entitled to seek leave under s. 486(2) of the Companies Act 1965 against the Liquidator.
>
> *Be that as it may, I am firmly of the view that this Honourable Court is at liberty to exercise its inherent jurisdiction whenever it is just or equitable to do so in order to do justice between the parties. To me, the absence of an express statutory provision under the Companies Act 2016 and the Companies (Winding-Up Rules 1972) in the presence case, does not mean that the door to the Applicants is completely closed.*
>
> (emphasis added)

[12] Section 486 of the Companies Act 2016 reads as follows:

> (i) Where a company is being wound up by the court, the liquidator may
>
> (a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and
>
> (b) with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule.
>
> (ii) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and **any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers**.
>
> (emphasis added)

[13] Section 486 refers to the powers of the liquidator in respect of the management of the wound-up company and administration of the liquidation. Subsection (2) clearly states that only the creditor or the contributory may question the exercise of the said powers by the liquidator by applying to the court. In the premise, the High Court is plainly correct in holding that the application for leave of the applicants cannot come under this provision.

Whether "Inherent Jurisdiction" Pleaded?

[14] Counsel for K & A Management and liquidator submitted that the application was only made under s. 486. This submission was made despite the fact that "and/or inherent jurisdiction" is clearly stated in the body of the *ex parte* motion. Nonetheless, counsel for respondents argued that the relief that was prayed for in the notice of appeal only mentioned s. 486. "Inherent jurisdiction" was omitted when praying for relief. We find no merit in this submission. Our main reason is that "inherent jurisdiction" is specifically stated in the body of the motion. In respect of the argument that only s. 486 is mentioned in prayers (1)(a) and (b) of the motion, it must be noted that the applicants included an omnibus prayer under prayer (3) seeking "any further and/or other orders or relief". Therefore, relief can be granted under the omnibus prayer as it is not there for ornamental purposes (see *Zulkiflee SM Anwar Ulhaque & Anor v. Arikrishna Apparau & Ors* [2013] 1 LNS 1264; [2014] 3 MLJ 553. In the premises, we find that "inherent jurisdiction" was properly pleaded and invoked in the motion.

Applying For Leave Under "Inherent Jurisdiction"

[15] The third issue in relation to the *locus standi* point argued by counsel for both parties is whether inherent jurisdiction can be invoked to seek leave from the winding-up court to commit the liquidator for contempt of court. But first, we shall address the issue whether leave from the winding-up court is required in the first place.

[16] The leave application in question is for the purpose of intended contempt proceedings in a civil suit (suit 534) where the wound-up company (K & A Management) is one of the defendants. To recapitulate, the learned High Court Judge in suit 534 was of the opinion that leave of the winding-up court is necessary to proceed against the liquidator. That was the reason for the instant leave application before the winding-up court. From the authorities cited by the parties, we are also of the opinion that leave from winding-up court must be obtained before contempt proceedings can be instituted against the liquidator. We shall cite some of the cases below.

[17] In *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 4 CLJ 11; [1995] 3 MLJ 204 which was cited by counsel for both parties, the appellant who sued the liquidator was neither a creditor nor a contributory of the wound-up company. The appellant was the landlord of the premises rented to the said company. Rental was owed to the appellant. The appellant sued the liquidator for it without obtaining leave from the winding-up court. A number of issues were argued before the Court of Appeal. We shall return to this authority again later in this judgment. On the issue of obtaining leave before suing the liquidator, the High Court found that s. 226(3) of the Companies Act 1965 (presently s. 486 of Companies Act 2016) was not complied with and dismissed the originating summons. The Court of Appeal affirmed the decision but for different reasons. The Court of Appeal said

where the application was in respect of wrongdoing on the part of the liquidator, the proper provision was s. 305 of the Companies Act 1965 (s. 541 of the Companies Act 2016). Section 226(3) of the Companies Act 2016 does not apply as it in respect of an action against the wound-up company. Nonetheless, the Court of Appeal expressed the view that leave of the winding-up court must be obtained before the liquidator is sued. The Court of Appeal, speaking through Abu Mansor Ali JCA, said as follows:

> We respectfully agree with the learned Judge below that the applicant's application should be so dismissed but for the different reason than that given by the learned Judge. We think that s. 226(3) of the Act only applies where the action is against the company but, as submitted by Counsel for the applicant, in this case the action was against the liquidator we have held, that s. 305 of the Act applies.
>
> While we agree that the applicant may proceed against the liquidator, we are however, firmly of the view the procedure is that the applicant must have first obtained authority from the winding-up Judge before proceeding against the liquidator and not, as was done here, proceeded independently to prevent unnecessary and wasteful litigation. The approach the learned Judge should take is as given in the Privy Council case of *Llyod-Owen v. Bull* cited above. A advised in that case, he has to obtain authority from a Judge below who will act liberally but must satisfy himself as to the probable success of this application and he has to give an assurance to the sanctioning Judge that this action is not vexatious or merely oppressive. The Court, in exercising their supervision, will ensure that no wasteful litigation is brought against liquidators and the like. Since the applicant had not obtained the authority to proceed, we struck off this appeal with no order as to costs.

[18] In *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors & Another Appeal* [2010] 2 CLJ 858; [2009] 3 MLJ 191, the trial judge made an *ex parte* order granting leave for issue of order of committal against the liquidator and the wound-up company. This order was later side aside by the High Court. It was held by the Court of Appeal that leave from the winding-up court was required when the proposed action against a liquidator was pursued in another court as he is an officer of the court. The relevant passages of the Court of Appeal are as follows:

> [18] We would agree with the submission of learned counsel for the liquidator. Upon perusing the authorities referred to earlier, we are of the unanimous view that prior leave from the court is required before the appellant can make any application for leave under O. 52 r. 2 of the Rules as against the liquidator, he being an officer of the court. It is clear that the appellant was not armed with such leave when he made the application against the liquidator.
>
> [19] As discussed earlier, learned counsel for the appellant in referring to *In re Maidstone Palace of Varieties Limited*, argued that leave of the winding up court is required only when the proposed action against a liquidator

A is pursued in another court other than the winding up court. We do not agree with counsel's proposition. Whether the purported action against the liquidator is in another court or the winding up court is irrelevant.

[19] Similarly, in the receivership cases cited in the above-mentioned case, it was stated that prior leave of court is required before action can be B commenced against a receiver in his personal capacity. The reason is that a receiver is an officer of the court. For all the above reasons, we would agree that prior leave from the winding-up court was required before the applicants can proceed with the committal proceedings against the liquidator. We also note that parties are on common ground on this issue.

C *Whether Inherent Jurisdiction Can Be Invoked?*

[20] The more contentious issue that requires determination is whether the inherent jurisdiction can be invoked by the applicants in seeking leave for the committal proceedings against the liquidator. Counsel for the K & A Management and liquidator argued that inherent jurisdiction cannot be D invoked. This is because the Companies Act 2016 had expressly provided that only relevant parties can act against the liquidator under ss. 486(2) and 541. Therefore, the court cannot allow other parties to commence action against the liquidator under the inherent jurisdiction of the court. It is implicit in this argument is that if an aggrieved third party not mentioned in E these two provisions intend to act against the liquidator through institution of contempt proceedings, there is no recourse in the law. Counsel for the liquidator argued as follows in the written submissions:

> Where a specific remedy is given by statute, it is not open for Liputan Canggih & 6 Ors to seek the remedy of the same nature by invoking the F inherent jurisdiction of the court as is in the present case.

We shall now examine the case authorities cited by counsel for the liquidator to determine whether this is the true position in the law.

[21] In *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* (*supra*) that we referred G to earlier, the Court of Appeal opined that s. 305 (presently s. 541 of Companies Act 2016) of the Companies Act 1965 is the correct provision to invoke if there was wrongdoing on the part of the liquidator. The relevant parties who can apply under s. 541 of the Companies Act 2016 includes a "creditor". Thus, had the plaintiff who was allegedly owed arrears of rental H by the wound-up company had applied under the old s. 305, they may have succeeded. In *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors* (*supra*), the Court of Appeal agreed with the liquidator that prior leave was necessary before committal proceedings can be instituted as he is an officer of the court. However, the Court of Appeal did not state what was the appropriate provision of the Companies Act 1965 under which the application should be I made.

[22] Before us, the argument of counsel for the applicants is that the application for leave can come under the inherent jurisdiction of the court. We note that during oral argument, the counsel for the applicants abandoned the argument that it can come under s. 486 of the Companies Act 2016. As we said earlier, the argument of counsel for the liquidator is that inherent jurisdiction cannot be invoked if statute has provided a specific remedy. The case of *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* (*supra*) and s. 541 of Companies Act 2016 were cited by counsel for the liquidator. As we pointed out earlier, in the said case, the Court of Appeal opined that s. 305 (presently s. 541) is the proper provision to rely on to take action against the liquidator for wrongdoing. Section 541 of the Companies Act 2016 reads as follows:

> (1) If in the course of winding up it appears that:
>
> (a) any person who has taken part in the formation or promotion of the company; or
>
> (b) any past or present liquidator or officer,
>
> has misapplied or retained or become liable or accountable for any money or property of the company or **been guilty of any misfeasance** or breach of trust or duty in relation to the company, the Court may, on the application of the **liquidator or of any creditor or contributory** examine into the conduct of that person, liquidator or officer and compel him to repay or restore the **money** or **property** or any part of the money with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of **compensation** in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just.
>
> (2) This section shall extend and apply to and in respect of the receipt of any money or property by any officer of the company during the two years preceding the commencement of the winding up whether by way of salary or otherwise which appears to the Court to be unfair or unjust to other members of the company.
>
> (3) This section shall have effect notwithstanding that the offence is one for which the offender is criminally liable.
>
> (emphasis added)

[23] We are of the opinion that this provision cannot apply to the alleged misconduct on the part of the liquidator in the instant case. Unlike in the case of *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* (*supra*), the instant applicants are not creditors of the wound-up company who are claiming for arrears of rental. Furthermore, the relief sought in the intended proceedings against the liquidator is not restoration of money, property or compensation. The applicants are applying to commit the liquidator for alleged contempt of court.

[24] In the premises, neither s. 486 nor s. 541 provide a statutory remedy for the intended action against the liquidator. We are also of the view that there is merit in the submission of counsel for applicants that the liquidator as an officer of the court is subject to the court's inherent jurisdiction especially on a matter that is not covered by the provisions of the Companies Act 2016. In *Deloitte & Touche AG v. Johnson* [1999] PC 486 which was cited by counsel for applicants, the Privy Council in hearing an application to remove a liquidator made the following general statement about the court's inherent jurisdiction over its own officers:

> As liquidators of the company the respondents are officers of the court. The court's inherent jurisdiction to control the conduct of this own officers is beyond dispute.

[25] Another eminent English authority on this point is the House of Lords decision in *Storer & Co Ltd v. Johnson and Weatherall* (1890) 15 App Cas 203 which dealt with a dispute over a solicitors' bill. The House of Lords decided that it was not possible to make an order for taxation over part of the bill under the Solicitors Act 1843 but in order to do justice, inherent jurisdiction could be invoked to do so. Lord Halsbury LC said as follows in his speech:

> ... I believe that your Lordships are all of opinion that in a proceeding under the Solicitors Act we cannot do what is asked to be done by the appellants. But it was of course open to the Court to pronounce a judgment which should do justice between the parties when once the case was brought before them. This was not a case in which the summons absolutely bound the Court as to the remedy which they should administer; and *I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers*, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. *The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit ...*
>
> (emphasis added)

[26] The passage we quoted above was also cited with approval in *Phuah Choon Hwang & Ors v. Hassan & Kong Yeam* [1986] 1 CLJ 513; [1986] CLJ (Rep) 579; [1987] 1 MLJ 156 by Mohamed Dzaiddin J for the principle that inherent jurisdiction is exercised independently of statute. The dispute in that case was also over a solicitor's bill. The bill could not be taxed under the Legal Profession Act 1976 as the application was made after the time stipulation of one year had expired. But the order for taxation was made under the inherent jurisdiction of the court as the petitioner had shown special circumstances. More recently in *Tan Tek Sin & Anor v. Tetuan Nora Hayati & Associates* [2015] 1 CLJ 89; [2015] 2 MLJ 1, the Court of Appeal when confronted with a similar case asked the question whether the court has the power by virtue of its inherent jurisdiction to depart from the provisions

of statute where the circumstances require. The Court of Appeal cited both *Storer & Co Ltd v Johnson* (*supra*) and *Phuah Choon Hwang & Ors v. Hassan & Kong Yeam* (*supra)* with approval when ordering the solicitor's bill to be taxed. Azahar Mohamed JCA (now CJM) also emphasised the role of the court in respect of its officers in the following passage:

> [28] In *Perusahaan Petanda Bintang Sdn Bhd v. Asbir, Hira Singh & Co* [1995] 2 MLJ 455; [1995] 3 CLJ 234, *the High Court held that by virtue of their role as watchdog over the conduct of solicitors (being officers of the court), the courts were not precluded under the LPA from invoking its inherent jurisdiction*, in appropriate cases even in petitions made outside the stipulated period, where the facts pleaded disclose a serious misconduct of gross overcharging or fraud on services rendered by an advocate and solicitor.
>
> [29] It is therefore clear on principle and authorities that that even though more than one year had lapsed since the delivery of the bill to the plaintiffs, *the court could exercise its discretion in invoking the inherent jurisdiction to grant* an order to compel the defendant to prepare a detailed bill of costs.
>
> (emphasis added)

[27] We have pointed out that the intended contempt proceedings against the liquidator cannot be brought within the ambit of either ss. 486(2) or 541 of the Companies Act 2016. However, that does not mean that the liquidator by default achieves some sort of immunity insofar as his conduct as an officer of the court is concerned especially *vis-a-vis* intended contempt of court proceedings. In a number of winding-up proceedings which were cited by counsel for applicants, inherent jurisdiction was successfully invoked to seek remedy in the absence of a statutory provision. It suffices if we quote the *Sibu Slipway Sdn Bhd v. Yii Chee Ming & Ors And Other Appeals* [2017] 6 CLJ 507; [2017] 1 MLJ 368. In that case, it was argued that winding-up orders were obtained by concealment of material facts and that it amounted to abuse of the process of the court. The Companies Act 1965 and the Companies (Winding-Up) Rules 1972 have no express provision to rescind or stay the order. In granting a stay, the Court of Appeal speaking through Nallini Pathmanathan JCA (now FCJ), said as follows:

> [30] Therefore the issue for consideration is whether this court retains an inherent jurisdiction to set aside or rescind or stay winding up orders which have been obtained in circumstances amounting to an abuse of process of the court, given that these proceedings are determined under the Act and the Companies (Winding-Up) Rules 1972. The Act and the Rules make no provision for setting aside or rescinding a winding up order. Does it follow therefore that this court has no inherent jurisdiction to intervene?
>
> [31] We conclude that this court has the inherent jurisdiction to intervene and set right or remedy an abuse of process in winding up proceedings, notwithstanding the lack of an express provision in the Act. ...

A [33] *Megah Teknik* has been applied by the High Court in the case of *Panaron Sdn Bhd v. Univac Switchgear Sdn Bhd* [2015] 9 MLJ 498; [2015] 2 CLJ 286 ("*Panaron*"). *Although the facts are completely different and do not relate to abuse of process, the fundamental position in law was recognised, namely that the court always retains a residuary power in its inherent capacity to intervene and remedy wrongs, particularly when there is an abuse of process.*

B

(emphasis added)

[28] We shall now turn to the Federal Court case of *Tee Siew Kai v. Machang Indah Development Sdn Bhd (In Liquidation)* [2020] 4 CLJ 841. Counsel for the liquidator cited this case and made the following submission:

C The Federal Court has therefore ruled that it is not open for parties who are not the creditors or contributories of the liquidated company to invoke the inherent jurisdiction of the court to expand on a clear and express provision of the statute. The Liquidator submits that to do is an abuse of the court process.

D **[29]** The basis for this submission is the following sentence in para. 73 of the judgment of the Federal Court:

The Court of Appeal in *Chi Liung Holdings* (*supra*) nowhere stated that an application for leave to commence an action against a liquidator in person should be made pursuant to the court's inherent jurisdiction, neither did
E the High Court in *Chin Cheen Foh v. Ong Tee Chew* (*supra*).

[30] In our view, this passage has been quoted out of context. In this case, the liquidator was sued in his personal capacity for the sale of the properties of the wound-up company at an undervalue. The main issue was whether the liquidator, who is an agent of the company, can be personally liable in
F damages to a party that is neither a creditor nor a contributory for carrying out his duty in selling the properties in question. The Federal Court set aside the grant of leave to commence proceedings against the liquidator in his personal capacity. The appellant relied on inherent jurisdiction of the court for the leave application. The Federal Court cited the case of *Deloitte &*
G *Touche AG v. Johnson* (*supra*) in respect of the standing the appellant who was neither a creditor not a contributory but held that the allegation of selling at an undervalue, even if true, is available only to a creditor or contributory. But the Federal Court did not categorically say that in all instances, leave cannot be obtained for the intended proceedings against a liquidator. In the
H above-mentioned case, it was clearly a case of suing the wrong party as the liquidator cannot be personally liable to a third party for carrying out his duty in selling the assets of a wound-up company.

[31] In the instant case, leave had been sought against the liquidator to commit him for contempt of court for not disclosing to the court in suit 534
I that the company had been wound-up and for other reasons that allegedly amounted to abuse of the process of the court. Thus, the liquidator is being sued in his capacity as the party having overall conduct and control of the litigation. The liquidator is not being sued as a party to a commercial

transaction involving the wound-up company as in the case of *Tee Siew Kai v. Machang Indah Development Sdn Bhd (In Liquidation)* (*supra*). For all the above reasons, we are of the view that the learned High Court Judge is correct in holding that the applicants have *locus standi* to apply for leave. In the premises, appeal 1284 which is against the decision of the High Court that the applicants had *locus standi* to apply for leave is dismissed.

Whether There Was Breach Of Natural Justice?

[32] Although, the learned High Court Judge granted *ex parte* leave initially, one of his reasons for setting aside his decision is that the failure to serve the relevant cause papers on the liquidator occasioned a breach of natural justice and prejudice. His Lordship had regard to r. 7 of the Companies (Winding-up Rules) 1972 (the Winding-up Rules) which reads as follows:

> (1) Every application in Court, other than a petition, shall be made by motion and **shall be served on the party effected thereby not less than two days** before the day named in the notice for hearing of the motion. An application for leave to serve short notice of motion shall be made *ex parte*.
>
> (2) Every application in Chambers shall be made by summons in Form 1, which unless otherwise ordered, **shall be served on every person against whom an order is sought**, and shall require that person or persons to whom the summons is addressed to attend at the time and place named in the summons; and the summons shall be served not less than two days before the day named in the summons, unless in any case it shall be otherwise ordered.
>
> (emphasis added)

[33] Counsel for applicants firstly submitted that the Winding-Up Rules do not apply to a post winding-up application such as the instant case. He cited two High Court cases in support, namely *Destination Marine Services Sdn Bhd v. ABS Pacific & Anor* [1998] 3 CLJ Supp 355; [1995] MLJU 338 and *Dayu Tegas Sdn Bhd lwn. Segamat Oil Mill & Plantation Sdn Bhd* [2015] 1 LNS 1418.

[34] Be that as it may, we find much merit in the second argument of counsel for applicants on the issue of breach of natural justice and prejudice. In the instant case, as we said earlier, the application for leave to commit the liquidator for abuse of process in the conduct of the litigation involving the wound-up company is not something that is specifically provided for in ss. 486 or 541 of the Companies Act 2016. Those provisions only enable a creditor or contributory to act against a liquidator. This is the reason we were of the view that inherent jurisdiction can be invoked to obtain leave of the winding-up court, especially after the High Court in suit 534 had made it a precondition for the contempt proceedings. Since, the application is under the inherent jurisdiction of the court, it must necessarily follow that the winding-up court can act independently of any written provision of the Companies Act 2016 or the Rules.

[35] In the instant case, the learned High Court Judge exercised his discretion at the outset to hear the leave application on *ex parte* basis. His Lordship could have ordered it to be heard *inter parte* but did not. After the order was granted, it was duly served on the liquidator who filed the setting aside application. This application was heard on the merits by the learned High Court Judge on *inter parte* basis with affidavits from both sides. Thus, in our opinion, even if there was a procedural defect at the earlier stage, the paramount question is whether it resulted in a breach of natural justice or otherwise occasioned irreparable prejudice.

[36] We agree with counsel for applicants that sufficient analogy may be found in the recent Federal Court case of *Mansion Properties Sdn Bhd v. Sham Chin Yen & Ors* [2021] 1 CLJ 609; [2021] 1 MLJ 527 and cases cited in it with the point that confronts us now. We are mindful that the facts are not on all fours with the instant appeal. The case concerned an application to enable a scheme of arrangement and to restrain creditors from suing the company under ss. 366 and 368 Companies Act 2016. However, the application was made *ex parte* and not served on the creditors. The Federal Court considered the following factors, *ie,* whether the statute was silent on the question of the requirement that the application should be made *inter parte* or *ex parte*, whether the application served the legislative purpose and whether the affected party can apply to set aside the said order. In the instant case, as we said earlier ss. 486 and 541 do not provide for a situation where an action for contempt of court is taken against the liquidator by a party who is neither creditor nor contributory.

[37] We noted earlier that the applicants abandoned reliance on s. 486 and based the application solely on inherent jurisdiction. However, as the leave order was obtained *ex parte*, the liquidator had a right to move the court to set it aside. He exercised that right. He was allowed to file affidavits to support the application and was given a full hearing. Thus, any defect by the non-service of the application had been cured by the right to apply to set it aside. In the premises, in the circumstances of this case, we find that there was no breach of natural justice.

Probable Success Of Action

[38] The test in granting leave for action to be commenced against a liquidator is not high. The purpose of requiring leave is to create a filter for the court to prevent wasteful litigation that will not drain the resources of the wound-up company which will not benefit creditors or contributories. The other reason is that the liquidator is a court officer. In *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* (*supra*), the test was stated to be "probable success" and "not vexatious or merely oppressive". Abu Mansor Ali JCA laid down the test as follows after referring to the Privy Council case of *Lloyd-Owen v. Bull* (1936) 4 DLR 433:

> As advised in that case, he has to obtain authority from a Judge below who **will act liberally but must satisfy himself as to the probable success** of this application and he has to give an assurance to the sanctioning Judge that this action is **not vexatious or merely oppressive**. The Court, in exercising their supervision, will ensure that no wasteful litigation is brought against liquidators and the like. Since the applicant had not obtained the authority to proceed, we struck off this appeal with no order as to costs.
>
> (emphasis added)

[39] In the instant case, the allegations against the liquidator in the intended committal proceedings are briefly stated as follows. He and five other respondents engaged in conduct calculated to impede and frustrate the administration of justice in the following ways.

[40] After the commencement of suit 534 against the K & A Management, a petition to wind it up was presented and the same liquidator was appointed as the interim liquidator on 7 December 2018. The High Court Judge in suit 534 was not informed. Under s. 471 of the Companies Act 2016, leave of court is required to proceed against K & A Management as interim liquidator had been appointed. On 18 January 2019, K & A Management was wound-up. The learned High Court Judge in suit 534 had scheduled the suit for trial by then. His Lordship was still doing active case management after the appointment of the interim liquidator and after the winding-up order was made. But the liquidator allegedly did not intimate to the court the said crucial developments. K & A Management's name in the cause papers were not amended to reflect its wound-up status in contravention of s. 516 of the Companies Act 2016. The director who affirmed affidavits for K & A Management did not state that he was authorised by the liquidator. The above allegations constitute the first charge in the intended committal proceedings.

[41] The liquidator is also alleged to have permitted K & A Management to take steps to proceed with or defend several applications in suit 534 without leave of the winding-up court under s. 471 of the Companies Act 2016. These allegations constitute the second charge in the intended committal proceedings. The learned High Court Judge addressed the probability of success of the intended committal proceedings only in the following paragraphs:

> The Applicant intended action against the Liquidator has no probability of success based on the facts, evidence and law referred to above. On the same note, I find that it is not necessary for me to deliberate at length on this issue, safe to say that there is no sufficient *prima facie* evidence to show a probability of success element. The Liquidators did not frustrate, impede, obstruct or prejudice the fair hearing or administration of justice in the proceedings of Suit 534.

A In this respect, I agree with the argument raised by the Learned Counsel for the Liquidators that the Liquidator did not failed to inform the Applicants on the winding-up status of the Respondent Company given that the Winding-Up Order had been advertised, *gazette* and lodged with the Companies Commissions of Malaysia and Insolvency Department. In furtherance thereof, the conduct of litigation in Suit 534 is based on the B instructions of the contributory of the Company upon the granting of sanction by the Liquidator, therefore, Liquidator is not involved with the direction of litigation in Suit 534.

In any event, the *nunc pro tunc*, leave application obtained by the Applicants to proceed with Suit 534 were not opposed by the Liquidator. Therefore, C the conduct of the Applicants to obtain leave to commence the committal proceedings against the Liquidator is vexatious and oppressive.

[42] Thus, in this passage, the learned High Court Judge only addressed the fact that a winding-up order would be in the public domain through advertisement and publication in the *Gazette* as required by law. His Lordship D did not consider all the other allegations including the fact the judge in suit 534 had fixed dates for trial but was not informed of all the developments from the appointment of the interim liquidator to the eventual winding-up of the company. There was opportunity to do so as the judge was still doing active case management at the material time. The possibility of infraction of E ss. 471 and 516 of Companies Act 2016 was also not considered by the learned High Court Judge. Furthermore, the point that the liquidator would have full control and conduct of the litigation of the wound-up company was not addressed either. We are not saying that the allegations in the affidavit of applicants have been proven on the merits. We are also not saying that F the learned High Court Judge should have made a finding to that effect. However, the allegations that were not addressed by the learned High Court Judge, to our mind, points to a *prima facie* case or probability of success for the purpose of the leave application. We also find it difficult to conclude on the undisputed facts that the application is frivolous or vexatious as found by the learned High Court Judge. After all, the leave sought is only for the G purpose of the first stage of contempt proceedings under O. 52 of the Rules of Court 2012 which provides another level of filter in which the applicants must demonstrate a *prima facie* case before the matter can proceed any further. Therefore, we would allow appeal 1180.

H **Conclusion**

[43] In conclusion, for the reasons given above, we would allow appeal 1180 and dismiss appeal 1284. We accordingly reinstate the *ex parte* order granted on 12 July 2019 by the learned High Court Judge. We order global costs of RM20,000 here and below for the two appeals to be paid to the I applicants by the liquidator which is to be paid out of the asset of the company in liquidation.